

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WOLFIRE GAMES, LLC, SEAN COLVIN,  
SUSANN DAVIS, DANIEL ESCOBAR,  
WILLIAM HERBERT, RYAN LALLY, HOPE  
MARCHIONDA, EVERETT STEPHENS,  
individually and on behalf of all others similarly  
situated,

Plaintiffs,

v.

VALVE CORPORATION,

Defendant.

CASE NO.: 2:21-cv-00563-JCC

DARK CATT STUDIOS HOLDINGS, INC., and  
DARK CATT STUDIOS INTERACTIVE LLC,  
on behalf of themselves and all others similarly  
situated,

Plaintiffs,

v.

VALVE CORPORATION,

Defendant.

CASE NO.: 2:21-cv-00872-JCC

**DARK CATT PLAINTIFFS' MOTION  
FOR APPOINTMENT OF CO-LEAD  
INTERIM COUNSEL FOR PROPOSED  
DEVELOPER CLASS PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 23(g)(3)**

NOTE ON MOTION CALENDAR:  
Sept. 17, 2021

ORAL ARGUMENT REQUESTED

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To align counsel with their clients’ and class members’ interests and to ensure the efficient prosecution of this and the related case,<sup>1</sup> Plaintiffs Dark Catt Studios Holdings, Inc. and Dark Catt Studios Interactive LLC (collectively, “Dark Catt”) respectfully ask the Court to appoint Dark Catt’s lead counsel from Lockridge Grindal Nauen PLLP (“LGN”) and Wilson Sonsini Goodrich & Rosati PC (“WSGR”) as co-lead interim class counsel for the proposed Developer Class.

Dark Catt’s counsel devoted hundreds of attorney hours, interviewed multiple industry participants, consulted extensively with an economist, and researched this case in depth for many months before filing. The two distinct types of plaintiffs who have sued Valve—developers who sold games on Valve’s Steam website and consumers who bought games through Steam—share certain interests supporting coordinated proceedings, but their interests diverge in material ways that require separate representation from the start of the litigation.<sup>2</sup>

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Dark Catt sued Valve on behalf of personal computer (“PC”) game developers (“Developers”) who contracted with Valve to distribute a PC video game via Steam and sold such a game on or after April 27, 2017 (“Developer Class”). *See* Compl. ¶ 202, ECF No. 1, No. 2:21-cv-00872-JCC (“*Dark Catt Action*”). Dark Catt alleges Valve maintains and expands its monopoly in the market for distribution of PC games through a variety of anticompetitive practices, including pricing, marketing, and output restrictions imposed on Developers, and collects hundreds of millions of dollars in monopoly profits at Developers’ expense.

The *Wolfire Action* also challenges Valve’s monopolization conduct but is brought on behalf of a much broader class comprised of *both* game developers and game buyers, defined as those who “purchased or sold a PC game on the Steam Store,” regardless of whether they had a Steam account. *See Wolfire Action* Consol. Am. Compl. ¶ 302, ECF No. 34 (“*Wolfire Compl.*”).

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<sup>1</sup> *See Wolfire Games, LLC v. Valve Corp.*, No. 2:21-cv-00563-JCC (“*Wolfire Action*”). This memorandum of points and authorities is also being filed in the *Wolfire Action* in partial opposition to the Motion for Appointment of Interim Co-Lead Class Counsel. *Wolfire Action*, ECF No. 38.

<sup>2</sup> This motion does not seek, or take a position on, appointment of counsel for game buyers.

1 This is a critical distinction. Wolfire Plaintiffs' expansive proposed class of buyers *and*  
 2 sellers creates an unavoidable conflict of interest for their proposed interim class counsel. That  
 3 Wolfire Plaintiffs' counsel are experienced lawyers and two of the firms were the first to add a  
 4 developer-plaintiff to the litigation does not answer the controlling question: Are Developers  
 5 better represented by interim lead counsel devoted solely to advancing the Developers' interests  
 6 against Valve, or by interim lead counsel owing a dual and at times materially conflicting  
 7 allegiance to game buyers and Developers? Respectfully, the answer is clear.

8 **First**, Developers are better off in their own case. To accommodate both Developers and  
 9 game buyers, the Wolfire Plaintiffs allege a more complex case than necessary to recover for  
 10 Developers alone. The *Wolfire* approach will be more challenging in discovery, to certify as a  
 11 class, and to prove at trial than Dark Catt's proposed Developer-only class.<sup>3</sup>

12 **Second**, in balancing competing interests, unitary counsel for a combined plaintiff group  
 13 will make suboptimal litigation choices for Developers than if Developers were alone. Already,  
 14 Developer Wolfire Games is facing a motion to stay its case while Valve seeks to compel  
 15 arbitration against its consumer co-plaintiffs. The issue arose for Wolfire Games only because of  
 16 its coextensive claims and combined proposed class with game buyers. Regardless of the  
 17 outcome, defending the motion adds expense and a risk of substantial delay for the Developers'  
 18 case as long as it is joined with the game buyers' case. As the litigation progresses, strategic  
 19 questions presenting different answers for Developers and consumers will multiply.

20 **Third**, while liability issues will overlap, Developers and game buyers diverge in the  
 21 necessary evidence development and trial strategy to maximize their respective recoveries. To  
 22 take one issue, game buyers will pursue a robust record and expert opinions to show that, in the  
 23 but-for world, Developers would have paid lower commissions to Valve *and* passed on to game  
 24 buyers all or most of those savings in the form of lower prices. Developers, on the other hand,  
 25 will be focused on establishing the supracompetitive commissions they paid to Valve; they do  
 26

27 <sup>3</sup> Dark Catt's counsel has never suggested it would represent game buyers and would not do so to gain  
 28 an interim leadership position. O'Rourke Decl. ¶ 11.

1 not want a discovery record developed or expert opinions offered that they would have passed  
 2 on most or all of their savings. Nor do Developers want their own lawyer arguing to a jury  
 3 determining damages for the combined Developers/buyers class that Developers would have  
 4 passed on most or all of their savings to buyers in the but-for world.

5 Settlement presents another conflict: the same lawyers cannot negotiate and allocate a  
 6 settlement fund among their game buyer and Developer clients that maximizes both groups'  
 7 recoveries. The conflict cannot be solved by assigning interim class counsel to different  
 8 subclasses, and bringing in new lawyers later on will increase costs and inefficiencies.

9 No doubt for these reasons and more, Wolfire Plaintiffs' proposed approach breaks from  
 10 standard practice. It was also recently rejected.<sup>4</sup> We are not aware of a case allowing interim lead  
 11 counsel to represent buyers and sellers, yet there are ample (and recent) cases appointing separate  
 12 interim lead counsel.<sup>5</sup> In fact, in every case cited by Wolfire Plaintiffs' counsel to show their  
 13 experience with two-sided platform cases, they represent only one type of market participant.

14 LGN and WSGR do not have divided loyalties and are well qualified to represent the  
 15 proposed Developer Class. The firms will coordinate discovery with game buyers' interim lead  
 16 counsel where interests align, while ensuring the vigorous, skilled and conflict-free representation  
 17 Rule 23 requires and Developers deserve.

## 18 **II. PROCEDURAL BACKGROUND**

19 The *Dark Catt Action* challenges similar general anticompetitive conduct by Valve as  
 20 alleged in the consolidated *Wolfire Action*, yet the factual allegations and theories of harm differ.

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22 <sup>4</sup> See Order Regarding Appointment of Counsel, *In re Google Dig. Advert. Antitrust Litig.*, No. 5:20-  
 23 cv-3556-BLF, ECF No. 133 (N.D. Cal. Apr. 26, 2021) (rejecting bid to be interim lead class counsel for  
 24 advertisers and publishers); see also Case Mgmt. Order No. 1, ECF No. 89 (N.D. Cal. Feb. 9, 2021)  
 (ordering separate consolidated complaints for advertising plaintiffs and publisher plaintiffs).

25 <sup>5</sup> The issue of separate counsel is rarely even contested. In antitrust cases with "two distinct groups  
 26 of plaintiffs" or market participants, courts routinely "divide the plaintiffs into two proposed classes and  
 27 appoint interim lead counsel for each class" prior to certification. *In re LIBOR-Based Fin. Instruments*  
*Antitrust Litig.*, No. 11-md-2262-NRB, 2011 WL 5007957, at \*3 (S.D.N.Y. Oct. 18, 2011). The animating  
 28 concern is that the "two classes may be differently positioned at various stages of the litigation, creating  
 a potential conflict in their joint representation." *Id.* at \*3 (noting the example of antitrust standing and  
 that the mere "likelihood that the argument will be raised is sufficient to generate a conflict").

1       ***Dark Catt Action:*** Dark Catt is a game developer that sold its PC game on Valve’s Steam  
 2 gaming website. Dark Catt Compl. ¶ 1. Dark Catt had no choice but to sell through Steam, and pay  
 3 supracompetitive fees, because of Valve’s monopolization of the market for PC game distribution  
 4 and exclusion of competition. *Id.* ¶¶ 1-2. Valve’s anticompetitive business practices include (i)  
 5 controlling Developers’ pricing and marketing on other, third-party storefronts where Developers  
 6 sell the same games available on Steam; (ii) using a system of authorization numbers known as  
 7 “Steam keys” to enforce its restrictive pricing and marketing terms and to control sales on other  
 8 storefronts; and (iii) using its control of the publicity and visibility of games on the Steam store to  
 9 keep game Developers in check, including through the Steam review system. *Id.* ¶¶ 9-19.

10       The Dark Catt Complaint is neither a copycat of nor derived from the Wolfire Complaint.  
 11 The two complaints necessarily have overlapping factual allegations about Valve’s  
 12 anticompetitive conduct and its dominant position in the PC gaming ecosystem. But Dark Catt  
 13 counsel’s investigation focused on Developers’ interactions with Valve in the market for PC game  
 14 distribution. In contrast, because it must also cover buyers, the Wolfire Complaint contorts to  
 15 define two relevant markets, and then alternatively proposes a third market. Dark Catt alleges facts  
 16 and many examples detailing Valve’s requirement that all games and add-on content be available  
 17 on Steam at the same time as any other storefront, review bombing by Steam users, and retaliation  
 18 to keep Developers compliant with its restrictions, none of which are in the Wolfire Complaint.  
 19 On the other hand, Dark Catt does not allege Valve has price veto power or focus on Valve’s lack  
 20 of investment in Steam and content moderation.

21       Dark Catt’s Complaint is brought on behalf of a unified group of similarly positioned  
 22 industry participants having a common commercial relationship with Valve. It alleges one relevant  
 23 market, a unified theory of causation, straightforward monopolization claims, and a single  
 24 damages analysis. None of this is true for the Wolfire Complaint. The Wolfire Complaint relies on  
 25 the Congressional Digital Markets Report and a two-sided platform theory of harm. *See* Wolfire  
 26 Compl. ¶¶ 79, 111, 182, 248, 281-82. The Dark Catt Complaint does not. The Wolfire Complaint  
 27 has six Section 2 claims given its relevant markets and tying claims, and a Section 1 claim alleging



1 unlawful agreements with game publishers, who Wolfire Plaintiffs purport to represent despite this  
 2 claim. The Dark Catt Complaint does not.

3 ***Wolfire Action:*** Wolfire Plaintiffs’ motion to appoint class counsel summarizes the  
 4 procedural history of the *Colvin* consumer case<sup>6</sup> filed in the Central District of California, the  
 5 *Wolfire* consumer and developer case filed three months later in this District, and the consolidated  
 6 amended complaint. Counsel’s organizational efforts in the two matters are noted.

7 Soon after the consolidated Wolfire Complaint was filed, Valve moved to compel  
 8 arbitration of the game buyers’ claims under the terms of the Steam Subscriber Agreement. *Wolfire*  
 9 *Action* ECF No. 35. Valve does not contend that Wolfire Games’ claims are subject to arbitration  
 10 but nevertheless seeks to stay the claims pending the individual arbitrations of the game buyers’  
 11 claims. Valve filed its motion to dismiss the Wolfire Complaint on July 26, 2021. *Wolfire Action*  
 12 ECF No. 37. Wolfire Plaintiffs have not yet responded to either motion.

### 13 **III. ARGUMENT**

#### 14 **A. Conflicting Interests Between Game Developers and Game Buyers Require** 15 **Appointment of Separate Interim Class Counsel**

16 The Court may “designate interim counsel to act on behalf of a putative class before  
 17 determining whether to certify the action as a class action.” Fed. R. Civ. P. 23(g)(3). To provide  
 18 the “structural protection” of class members required by Rule 23(a), “separate representation to  
 19 eliminate conflicting interests of counsel” is needed whenever conflicting interests exist. *Ortiz v.*  
 20 *Fibreboard Corp.*, 527 U.S. 815, 856-57 (1999); *see also Amchem Prod., Inc. v. Windsor*, 521  
 21 U.S. 591, 627-28 (1997) (discussing proposed settlement). Separate representation is required  
 22 even early in a case when the conflicting interests may not be fully manifest; separate counsel  
 23 should be designated when the potential for conflict first appears. *See Baker v. Arnold*, No. C 03-  
 24 05642 JF, 2004 WL 7340186, at \*3-4 (N.D. Cal. May 17, 2004); *In re Cardinal Health, Inc.*  
 25 *ERISA Litig.*, 225 F.R.D. 552, 558 (S.D. Ohio 2005) (denying motion to appoint lead counsel  
 26

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27 <sup>6</sup> *See Colvin v. Valve Corp.*, No. 2:21-cv-00801 (C.D. Cal. Jan. 28, 2021) (“*Colvin Action*”).

“because of the possibility of an appearance of divided loyalties”); *In re Photochromic Lens Antitrust Litig.*, No. 8:10-cv-00984-T-27EA, 2014 WL 1338605, at \*10-11 (M.D. Fla. Apr. 3, 2014) (finding the “*potential* for a serious and fundamental conflict” between class members precludes appointment of the same counsel).

Class members who face “incentives to maximize their damages” that would involve “contradictory arguments” for separate subclasses present a “fundamental conflict” that prohibits counsel from serving as lead counsel for all class members, even if divided into subclasses. *Halman Aldubi Provident & Pension Funds Ltd. v. Teva Pharm. Indus. Ltd.*, No. CV 20-4660-KSM, 2021 WL 1217395, at \*9-10 (E.D. Pa. Mar. 26, 2021) (finding a disqualifying conflict).

The case theories of the Developers and game buyers present just such a “fundamental conflict” and should proceed with independent interim class counsel to protect their interests and insulate the results achieved from any later claim of divided loyalties. The groups are differently situated in their relationship to Valve, operate in different markets, contracted with Valve under different agreements (or under no agreement), and suffered different antitrust injuries. They are not united by a “uniformity of legal theory” to permit counsel to adequately represent them all. *Alberton v. Commonwealth Land Title Ins. Co.*, 264 F.R.D. 203, 208-09 (E.D. Pa. 2010).

Wolfire Plaintiff counsel’s individual investigations and original complaints illustrate this point. They highlight the separateness of consumers and Developers. Vorys filed the *Colvin* complaint on behalf of game purchasers only and continues to represent “Consumer Plaintiffs.” Rubin Decl. ¶ 1, *Wolfire Action* ECF No. 41. The *Colvin* complaint also sued eight “game developer Defendants,” each of which “sells PC games through the Steam platform.” *Colvin Action* Compl. ¶¶ 19-27, ECF No. 1. Vorys and its clients now seek to represent a class that includes at least some of these same entities.

Constantine Cannon was hired by developer Wolfire Games. Golden Decl. ¶ 3, *Wolfire Action* ECF No. 39. The original Wolfire complaint listed the firm as counsel for “Plaintiffs,” which includes game buyers and Wolfire, but now states it represents only Wolfire out of the named plaintiffs. Wolfire Compl. at 96. Quinn Emanuel began investigating Valve’s actions only

1 *after* the *Colvin* complaint was filed, and subsequently joined Constantine Cannon to file the  
2 original Wolfire complaint. Olson Decl. ¶ 14, *Wolfire Action* ECF No. 40. Quinn Emanuel also  
3 entered the litigation on behalf of “Plaintiffs,” both game buyers and Developer Wolfire, and now  
4 states it represents only game buyer named plaintiffs. Wolfire Compl. at 96.

5 The Wolfire Complaint continues to recognize the conflict of interest and asserts that the  
6 proposed class “can also be broken out” into separate subclasses for game buyers and Developers  
7 if needed. *Id.* ¶ 303. They propose three subclasses: (1) game buyers who do not use the Steam  
8 gaming platform; (2) all game buyers who purchased a PC game on Steam; and (3) game publishers  
9 (*i.e.*, Developers) who sold PC games on Steam. *Id.* In seeking appointment as interim class  
10 counsel, the three firms have proposed that all three represent the full class.

11 The game buyers ultimately seek to show that a large amount of the overcharges  
12 Developers paid to Valve would have flowed to them. They argue that, in a competitive world in  
13 which Developers paid lower fees to Valve, Developers would pass on savings to game buyers as  
14 lower game prices. *See* Wolfire Compl. ¶¶ 275 (“[P]ublishers will steer consumers to lower-cost  
15 options for purchases if they are able to do so, passing on a portion of cost savings to consumers”),  
16 297 (“[P]ublishers would pass on savings from lower commissions to consumers to some  
17 degree.”). To increase their damages, they want to prove that a high portion was passed on to them.

18 If their claims are conjoined, this argument will undermine Developers’ own damages  
19 argument. Game Developers undoubtedly will testify they would have used the extra revenue to  
20 improve their businesses and their games (*e.g.*, hire programmers, upgrade equipment, reduce  
21 corporate debt) as well as lower prices. To increase their damages, game buyers, by contrast, will  
22 not want this evidence of other uses for Developers’ savings but want to show Developers would  
23 have passed on all or most of their savings. The difference means game buyers and Developers  
24 will develop opposing evidence in percipient and expert discovery and present differing evidence  
25 at class certification and trial.

26 Each group is entitled to present its claims fully and recover fully, but they cannot do so  
27 together, led by the same counsel arguing to the same jury that game buyers should be awarded

1 most or all of the same total overcharges that the jury should also award to Developers. That is,  
 2 Developers’ claims are undermined if their lawyer is arguing for, in effect, double recovery. This  
 3 divergence in best interests carries through nearly every stage of the litigation—discovery, class  
 4 certification, experts, and trial—and precludes the same lead counsel from representing both  
 5 groups. *See Halman Aldubi Provident & Pension Fund*, 2021 WL 1217395, at \*9-10.

6 Wolfire Plaintiffs state that Developers and buyers are direct purchasers from Valve, citing  
 7 *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), and so each can recover their full damages. This  
 8 does not address the factual conflict or differing litigation approaches for the sellers and buyers,  
 9 as seen in the *Apple* case. The case involved a proposed class of app buyers, and the district court  
 10 appointed separate counsel for the later-filed, related app developers’ class case. Order, ECF No.  
 11 34, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-6714 (N.D. Cal. Apr. 9, 2012) (appointing  
 12 interim lead counsel for purchasers); Order, ECF No. 65, *Cameron v. Apple, Inc.*, No. 4:19-cv-  
 13 3074 (N.D. Cal. Oct. 10, 2019) (appointing interim lead counsel for developers).<sup>7</sup>

14 The same counsel cannot credibly argue both that Developers should recover the full  
 15 amount of the overcharge they paid to Valve, and that the buyers should also recover most or all  
 16 of this same amount because it was passed through to them as higher retail prices. Again, the *Apple*  
 17 litigation shows this. In their motion for class certification, the app buyers explained that they were  
 18 able to show class-wide antitrust injury through their expert’s two-part analysis: “first estimating  
 19 Apple’s but-for commission structure and then estimating the effect of Apple’s but-for commission  
 20 on the prices for apps and [in-app purchases].” Mot. for Class Certification at 21, ECF No. 441, *In*  
 21 *re Apple iPhone Antitrust Litig.* (N.D. Cal. June 1, 2021) (estimating but-for commission rates of  
 22 10% to 12% and then pass through to purchasers). The analysis involved estimating consumer  
 23 demand and “using profit maximization conditions to estimate developer costs and but-for prices”  
 24 for apps if the App Store commission was lower.

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27 <sup>7</sup> Wolfire Plaintiffs characterize the Apple App Store as analogous to Steam and rely on the related  
 28 cases throughout their Complaint. *E.g.*, Wolfire Compl. ¶¶ 181-82, 275, 278-83.

1 The Apple app developers also modeled the but-for commission structure Apple would  
 2 have charged to show that damages are capable of class-wide proof, but their expert used a  
 3 different methodology and different evidence, and arrived at a different percentage. Developer  
 4 Pls.’ Mot. for Class Certification at 18-20, ECF No. 332, *Cameron v. Apple, Inc.* (N.D. Cal. June  
 5 1, 2021) (estimating but-for commission rates of 13% to 14.8%).

6 Courts in this Circuit have repeatedly recognized the conflict in similar situations. In a  
 7 consolidated case involving (i) advertisers who purchased ads on third-party websites through  
 8 Google’s advertising platform and (ii) publishers who sold ads on their websites using Google’s  
 9 advertising platform, the court *rejected* an attempt by counsel to represent both the publishers and  
 10 advertisers. *See* Order re Appointment of Counsel, ECF No. 133, *In re Google Dig. Advert.*  
 11 *Antitrust Litig.*, No. 5:20-cv-3556-BLF (N.D. Cal. Apr. 26, 2021). The court was unpersuaded by  
 12 the law firm’s arguments, as here, that it filed the earliest complaint, did so on behalf of both  
 13 publisher and advertiser plaintiffs who had aligned interests and overlapping claims, and that  
 14 separate representation for the publishers and advertisers could later be appointed if needed. Appl.  
 15 of Girard Sharp LLP for Appointment as Interim Lead Counsel, ECF No. 102, *In re Google Dig.*  
 16 *Advert. Antitrust Litig.* (N.D. Cal. Feb. 25, 2021).

17 The *In re Google Play Antitrust Litigation* (MDL No. 2981) is another example. *See, e.g.,*  
 18 Order Appointing Interim Class Counsel, ECF No. 79, *In re Google Play Developer Antitrust*  
 19 *Litig.*, No. 3:20-cv-5792 (N.D. Cal. Dec. 11, 2020) (appointing co-lead counsel for developers);  
 20 Order re Interim Class Counsel, ECF No. 128, *In re Google Play Consumer Antitrust Litig.*, No.  
 21 3:20-cv-5761 (N.D. Cal. Dec. 16, 2020) (appointing separate co-lead counsel for consumers).

22 In another example, advertiser plaintiffs’ counsel successfully argued that the proposed  
 23 class needed to be represented by separate interim class counsel from the proposed user class.  
 24 Advertiser Pls.’ Mot. for Appointment of Interim Co-lead Counsel & Exec. Committee at 3, ECF  
 25 No. 58, *Klein v. Facebook, Inc.*, No. 20-cv-8570-LHK (N.D. Cal. Mar. 5, 2021) (noting the  
 26 proposed classes had “different theories of liability, antitrust injury, and damages occurring in  
 27 different relevant markets” and “advertisers’ priorities and concerns in discovery will vary from

those of the users”).<sup>8</sup> The uncontested split between groups of plaintiffs is also readily seen in cases brought by different groups of indirect purchasers of an allegedly price-fixed product acting at different stages of the distribution chain such as resellers and end consumers.

Wolfire Plaintiffs’ counsel cannot zealously and fairly represent both the Developers and game buyers throughout this litigation to achieve the best possible outcome and damages award for each class independent of the outcome for the other class.<sup>9</sup> Separate lead counsel are required.

**B. LGN and Wilson Sonsini, If Appointed as Co-Lead Interim Class Counsel, Will Effectively Represent the Proposed Developer Class**

Interim lead class counsel must represent the interests of the class. Fed. R. Civ. P. 23(g)(2). Courts must consider: (1) the work counsel has done in identifying or investigating the potential claims; (2) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted; (3) counsel’s knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). Courts “may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class,” and no single factor is determinative. Fed. R. Civ. P. 23(g)(1)(B). Courts appointing interim class counsel under Rule 23(g)(3) before a class is certified apply these same factors. *See Smith v. State Farm Mut. Auto. Ins. Co.*, 301 F.R.D. 284, 288 (N.D. Ill. 2014).

LGN and WSGR have already taken significant steps to identify and investigate the factual and legal basis of Dark Catt and the proposed Developer Class’s claims. *See* Fed. R. Civ. P. 23(g)(1)(A)(i); Moore’s Federal Practice § 23.120(3)(a) (2007) (court may consider whether an

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<sup>8</sup> *See also* Mot. to Appoint Shana S. Scarlett of Hagens Berman Sobol Shapiro LLP and Brian D. Clark of Lockridge Grindal Nauen PLLP Interim Co-lead Counsel at 1 n.1, ECF No. 59 (N.D. Cal. Mar. 5, 2021) (not seeking appointment as to advertisers “due to the potential conflict of interests between the two groups of plaintiffs”); Order Appointing Interim Class Counsel, ECF No. 73 (N.D. Cal. Mar. 18, 2021) (appointing separate counsel).

<sup>9</sup> Nor could Wolfire Plaintiffs’ counsel simply abandon the game purchasers and thereby sidestep their conflict of interest. *See Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581, 590-91 (W.D. Tex. 2002) (“This proposal not only fails to erase all of this Court’s concerns about potential conflicts, it clearly illustrates them and causes the Court to question the zeal with which counsel are looking after their clients’ interests as opposed to their own. Counsel quickly dropped the class in the lower-dollar state action, but decided to stay involved in this and the New York Litigation, both potentially more lucrative.”).



attorney has undertaken “the process of drafting the complaint [which] requires investigatory and analytical effort”). LGN and WSGR are committed to devoting the time and resources needed to successfully litigate the Developers’ claims. They are experienced antitrust litigation firms with extensive experience prosecuting and defending antitrust actions and other complex litigation, and they have deep knowledge of antitrust law. *See* Fed. R. Civ. P. 23(g)(1)(A)(ii)-(iii). If appointed, LGN and WSGR will execute all duties and responsibilities of lead counsel to effectively resolve this litigation while ensuring the matter is adjudicated in an efficient manner.

**LGN** is a 58-attorney, five-office firm specializing in antitrust and other federal civil litigation for over 40 years. Bruckner Decl. ¶ 4. **Joseph Bruckner, Joseph Bourne, Leona Ajavon**, and the firm’s other attorneys have prosecuted major cases and class actions involving monopolization, attempted monopolization, exclusionary conduct, anticompetitive MFN agreements, price-fixing, industry cartels, predatory pricing, price discrimination, and other antitrust cases in courts nationwide. *Id.* ¶ 10. In just the past decade, LGN and its colleagues have recovered billions of dollars for their clients and class members in national and international antitrust cases. *Id.* ¶ 11. **Joseph Bruckner**, a senior partner at LGN, is personally committed to prosecuting this case and will devote himself to its leadership. *Id.* ¶ 3. Mr. Bruckner leads LGN’s antitrust law practice and is a nationally recognized antitrust leader with 30 years of experience representing plaintiffs in antitrust class actions and other complex litigation nationwide. *Id.* ¶ 16. Additional experience and qualifications are noted in the Bruckner Declaration.<sup>10</sup>

**WSGR** has approximately 900 attorneys in 16 offices worldwide, and for more than six decades, the firm has represented technology pioneers. O’Rourke Decl. ¶ 12. The firm’s antitrust team is consistently recognized among the leading antitrust practices worldwide, especially in high-tech matters. *Id.* ¶ 15. The firm provides a full range of services to electronic gaming clients via its multi-disciplinary electronic gaming practice. *Id.* ¶ 13. **Kenneth (Ken) O’Rourke** is personally committed to prosecuting this case and will devote himself to its leadership. *Id.* ¶ 3.

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<sup>10</sup> More information about LGN, its practice, and its record of accomplishment can be found at [www.locklaw.com](http://www.locklaw.com).

For 35 years, Mr. O’Rourke has represented clients in complex litigation including several substantial antitrust cases through pre-trial and trial. *Id.* ¶ 25. **Scott Sher**, a leader of the firm’s antitrust practice, is nationally recognized as a top antitrust lawyer. *Id.* ¶¶ 36, 40. **Allison B. Smith** is an antitrust associate in the Washington, DC office who has represented clients in several high-profile antitrust litigations. *Id.* ¶¶ 45-47. **Stephanie Jensen**, Of Counsel in the Seattle office, is a litigator and adjunct professor at Seattle University School of Law. *Id.* ¶¶ 43-44. She also serves on the Western District’s Pro Bono Panel. *Id.* ¶ 43. Stephanie will serve as a team leader and local counsel for LGN and others on the WSGR team.

LGN and WSGR stand ready to dedicate the resources necessary to represent and protect the interests of the proposed Developer Class through rigorous motion practice, discovery, class certification, and trial. *See* Fed. R. Civ. P. 23(g)(1)(A)(iv).

LGN and WSGR will continue to work cooperatively with all counsel. As demonstrated through their long history of success in complex litigation, LGN and WSGR have an effective management style. They will work closely with counsel for the game buyers, and will coordinate discovery and all other aspects of the litigation wherever it makes good sense to do so. They also have a demonstrated record of working professionally with counsel on both sides of cases, as well as with third parties, courts and their staff, and all others involved, and they will continue to do so in this litigation. *See Baker v. Saint-Gobain Performance Plastics Corp.*, No. 1:16-CV-0220 (LEK/DJS), 2016 WL 4028974, at \*4 (N.D.N.Y. July 27, 2016) (interim counsel’s “ability to command the respect of their colleagues and work cooperatively with opposing counsel and the court” are important considerations) (internal quotations omitted).

#### IV. CONCLUSION

For these reasons, Dark Catt respectfully requests that the Court deny the Wolfire Plaintiffs’ motion for appointment as interim counsel as to Developers, grant the present motion, and appoint LGN’s and WSGR’s lead counsel as co-lead interim class counsel for the proposed Developer Class.

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